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Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, submitted pursuant to General Assembly resolution 72/180 and Human Rights Council resolutions 31/3 and 35/34. In the report, the Special Rapporteur addresses the human rights challenge of states of emergency in the context of countering terrorism. In particular, she identifies new post-9/11 emergency practices and their adverse effects. Emergencies are not a new phenomenon for States. Human rights law enables States to limit the full exercise of derogable human rights when governments are faced with exceptional challenges requiring proportionate and necessary restrictions to human rights. However, emergency powers are a limited device. States' use of emergency and exceptional national security measures should provide a positive basis by which to return to the full protection of human rights within a reasonable time frame. States of emergency have long been correlated with extensive and wide-ranging human rights violations. The Special Rapporteur details the relationship between entrenched emergency powers and sustained human rights violations and affirms that States are not well served by the institutionalization of states of emergency. She sets out guidelines and good practice that she encourages governments to adopt while countering terrorism so as to systematically address the pernicious problem of permanent emergencies. The Special Rapporteur also offers her views on international human rights supervision mechanisms and encourages a firmer and more robust approach in judicial and regulatory oversight. She affirms that the wider global challenge of addressing the conditions conducive to terrorism and violent extremism will be advanced if the practices of permanent and de facto emergencies are dealt with unflinchingly. States have much to gain by dismantling their permanent and de facto emergency structures, as does the rule of law, broadly defined.

* The present report was submitted after the deadline in order to reflect the most recent developments.

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I. Concept and legal basis for emergency powers while countering terrorism

1. Emergencies are often unforeseen and unexpected phenomena which require immediate action. Emergencies can be political, social, economic and ecological in nature. While acknowledging that a range of different kinds of emergencies require governments to respond by law, the Special Rapporteur focuses on the ways in which the protection of human rights must be ensured in situations where terrorism, violent extremism and counter-terrorism can create emergency conditions that require emergency responses by States. International law recognizes the permissibility of certain restrictions on certain rights and freedoms during emergencies and enables governments to take measures that are necessary, proportionate and consistent with international law obligations.

2. Terrorism is an old and global phenomenon, with a variety of manifestations and forms. Terrorism lacks a comprehensive and agreed treaty definition under international law. However, substantial inroads have been made by consensus regarding a range of acts and actors that seek to provoke fear within a population and which are prohibited by States and subject to sanction. Since 1963, the international community has developed 19 international legal instruments to prevent terrorist acts.[1] International law affirms the general duty of States to protect individuals under their jurisdiction against interference in the enjoyment of human rights, including enabling their security, which is itself broadly defined. More specifically, this duty is recognized as part of States' obligations to ensure respect for the right to life[2] and the right to security of person.[3]

3. It is generally recognized that some terrorist acts and the actions of terrorist organizations can create necessary and sufficient conditions to activate the threshold of emergency under both national and international law, subject to the requirements of legality, proportionality and non-discrimination. Random acts of terrorism, while egregious and harm producing, may not reach the necessary thresholds or pose the scale of threat sufficient to activate emergency powers under national and international law. The Special Rapporteur maintains the view, consistent with the practice and jurisprudence of regional human rights courts, that each country must individually demonstrate that it experiences the level and scope of threat to necessitate the use of emergency powers. There is no generic authorization for global emergencies, and such a process would significantly impinge on State sovereignty. Many States have robust, effective and highly functional legal systems that are capable and designed to withstand a range of challenges, including those posed by violent, politically motivated offenders. Thus, terrorism may trigger the conditions of emergency, but that does not mean per se that States must use emergency powers to regulate terrorism, especially when the ordinary law of the State is sufficient and robust.

4. The present report is concerned that counter-terrorism regulation may function as a consolidating form of emergency practice. Not all counter-terrorism legislation and administrative practice constitute emergency regulation. For example, when counter-terrorism norms regulate hitherto unregulated areas — such as terrorist financing post 9/11 — there is no specific emergency effect necessarily implicated. Here, counter-terrorism laws are merely a particular species of ordinary law. However, where counter-terrorism laws directly and substantially impinge on the full and equal enjoyment of human rights, premised on the experience or threat of terrorist acts or actors, then both restrictions on rights and emergency law are implicated. In that context, counter-terrorism law and practice should be understood as a particular sub-species of emergency regulation and subject to heightened oversight.

5. Recognizing that terrorist acts and the actions of terrorist organizations can activate the threshold of emergency under both national and international law does not mean that the responses of States are unconstrained. Relevant United Nations resolutions require that

[1] See www.un.org/counterterrorism/ctitf/en/international-legal-instruments.

[2] See International Covenant on Civil and Political Rights, art. 6.

[3] Ibid., art. 9.

States ensure that any measure — including activation of an emergency — taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with all of their obligations under international law, in particular international human rights law, refugee law and humanitarian law.[4]

6. The Special Rapporteur affirms that, in many contexts, States would be better served by regulating terrorism using ordinary law rather than resorting to exceptional regulation. International law requires States to use ordinary law if emergency measures are not strictly necessary. Overreaction by governments can ratchet up the levels of violence and confrontation as well as undermine the broader fight against terrorism and inadvertently bolster the conditions conducive to terrorism. States must precisely calibrate the ways in which they use the law and limit the impingement upon human rights when countering terrorism. States would be well-served to understand that when emergency powers are misused, overused and misapplied, the consequences for the rule of law, accountability and transparency are devastating.[5]

A. International law

7. A driving feature of the major regional and international human rights treaties is that they explicitly acknowledge and provide for the experience of crisis. This accommodation mechanism is enabled by the process of derogation from human rights treaties. Derogation refers to the legally mandated privilege of States to restrict certain individual rights in the exceptional circumstances of emergency or war. A variety of terms is used to describe these exceptional circumstances. The European Convention on Human Rights uses the operative phrase "time of war or other public emergency threatening the life of the nation", and similar terminology can be found in the International Covenant on Civil and Political Rights. The American Convention on Human Rights describes exceptional circumstances as "time of war, public danger, or other emergency that threatens the independence or security of a State Party". Each treaty requires that the scale of threat to the State must be exceptional and affect the fundamental capacity of the State to function effectively. Critically, a State need not enact specific "emergency" legislation for derogation to follow; ordinary law or practice sufficiently based on an actual threat to the State and encroaching substantially on rights can require a State to derogate from its international treaty obligations.

8. In parallel, the Universal Declaration on Human Rights and human rights treaties allow States to partially restrict the full enjoyment of human rights through limitation clauses to a specified extent and for justifiable purposes when certain conditions are met. Limitations must be: (a) necessary; (b) impinge only minimally on rights (least restrictive alternative); (c) demonstrate proportionality between means and clearly stated objectives; and (d) consistent with other fundamental rights and non-discriminatory in purpose and practice. States may respond to emergency situations, including terrorism, by limiting specific rights rather than derogating from them.[6] Limitations are conceptually narrower than derogation and were designed to meet specific objectives to a specific extent and for certain democratically justifiable purposes. For example, a right may be limited in order to prevent conflict with other rights. Limitations are prudent measures designed to protect public goods and the rights of others without undermining essential human rights that provide the foundation for a dignity-based society. Derogation from certain treaty obligations in emergency situations is legally distinct from restrictions allowed in normal times. Restrictions may be viewed (in theory) as having a less severe effect on the

[4] See www.un.org/counterterrorism/ctitf/en/international-legal-instruments. See also Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180.

[5] See Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss, "Emergency and escape: explaining derogations from human rights treaties", International Organization, vol. 65, No. 4 (Fall 2011), pp. 673–707.

[6] See Alexandre Kiss, "Permissible limitations on rights", in *The International Bill of Rights: The Covenant on Civil and Political Rights*, Louis Henkin, ed. (Columbia University Press, 1981).

protection of human rights, though the problem of de facto emergencies using counter-terrorism legislation and practice underscores that this is not the case in practice.

9. Treaty provisions have given rise to a substantial amount of jurisprudence from national, regional and international bodies that amplifies and interprets when a derogation is justified, what kinds of measures and in what degree are justified, as well as oversees State reporting and notification. When States drafted these treaties, they were aware of the challenges of terrorism, insurrection, internal armed conflict and collective violence. Derogation remains relevant and useful to States facing crises today. Even as new methods and means of terrorism have emerged in recent decades, the language of derogation is sufficiently broad and encompassing to address new challenges and new contexts. New applications of emergency powers must be tested against these international standards to assess if the counter-terrorism measures used are necessary, proportionate and lawful under international law.

10. If States must suspend their international human rights obligations in an emergency, all measures derogating from the provisions of the International Covenant on Civil and Political Rights (and/or regional human rights treaties) must be of an exceptional and temporary nature. Before a State invokes a derogation, two fundamental conditions must be met: the situation must amount to an emergency which threatens the life of the nation, and the State must have officially proclaimed a state of emergency.

11. The Covenant and regional human rights treaties require that, even during an armed conflict, measures derogating from the Covenant are only allowed if and to the extent that the situation constitutes a fundamental threat to the State. An essential requirement for measures derogating from the Covenant is that they be limited to the extent strictly required by the exigencies of the situation.[7] Courts interpret this requirement as applying to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation. The obligation to limit derogations to those strictly required by the exigencies of the situation reflects the principles of legitimacy, proportionality and necessity.

12. Derogation requires that the scale of threat be exceptional and affect the State's fundamental capacity to function effectively, and impact the State's core security, independence and function. The Special Rapporteur emphasizes that the exercise of emergency powers must reach high and specific thresholds to be lawfully exercised under international law.

13. The Special Rapporteur reminds States of the threshold required to activate emergency powers, in conformity with international law. In *Lawless v. Ireland*,[8] the European Commission on Human Rights defined a "public emergency" for the purposes of article 15 of the European Convention on Human Rights as "a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes State in question."[9] In *The Greek Case*,[10] the Commission identified four characteristics of a "public emergency" under article 15 of the European Convention: it must be actual or imminent; its effects must involve the whole nation; the continuance of the organized life of the community must be threatened; and the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[11]

14. In its general comment No. 5, the Human Rights Committee indicated that an emergency will justify derogation only if the relevant circumstances are of an exceptional

[7] See A/36/40, annex VII, general comment 5/13.

[8] See European Court of Human Rights, *Lawless v. Ireland*, application No. 332/57 (A/3), judgment of 1 July 1961, affirmed in *A. and Others v. the United Kingdom*, application No. 3455/05, judgment of 19 February 2009, para. 176.

[9] See *Lawless v. Ireland*, para. 90.

[10] See European Commission of Human Rights, *The Greek Case*, application Nos. 3321–3323 and 3344/67, Report of the Commission (1969).

[11] Ibid. para. 153.

and temporary nature.[12] The Committee determined that States bear the burden of showing that those requirements have been fulfilled.[13] The principles set out in general comment No. 5 were reviewed and expanded in general comment No. 29 (2001) and the exceptional and temporary nature of emergencies was again stressed.[14] The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have also accepted the requirement that an emergency be exceptional and temporary. The Inter-American Commission has often expressed the opinion that governmental emergency measures may only be carried out in "extremely serious circumstances" and may never suspend certain fundamental rights.[15] In its advisory opinion on habeas corpus in emergency situations, the Inter-American Court stated that article 27 of the American Convention on Human Rights was "a provision for exceptional situations only."[16] There is broad international consensus on the general contours of the term "emergency", specifically its contingent and exceptional nature, the necessity of overseeing and regulating emergencies and the finite and limited purposes of emergency powers.

B. Domestic law

15. States have multiple and varied domestic procedures to legally proclaim an emergency. These include constitutional, executive and legislative mechanisms to enable the activation of emergency powers in domestic law, which may impinge on the full and equal enjoyment of human rights. Importantly, States may not rely on the provisions of its internal law as justification for failure to comply with its international obligations.[17]

16. For many States, authority for the exercise of emergency powers can be traced to their Constitution. Constitutions vary in articulation, but a common thread is the enumeration of circumstances which merit a proclamation of emergency.[18] Legislative models also dominate the national regulation of crises, including responses to terrorism. The legislative model generally delegates, in legislation, special powers to the executive to respond to the exigencies of a particular emergency. In general, this model enables the powers to lapse once the emergency has ended. In practice, the challenge for human rights protection has been the absorption of emergency statutes into the ordinary legal framework, including counter-terrorism legislation, which essentially normalizes the exception.[19]

17. A residual category of legal authorization for states of emergency falls under the doctrine of necessity. The doctrine is founded on the assumption that situations of extreme danger justify resorting to exceptional regulation which might otherwise be unlawful. Given the wide latitude for a subjective governmental view on what constitutes extreme danger and the lack of coherent regulatory oversight, this category has significant and negative impact on the enjoyment of human rights.

18. A key principle of domestic procedures is that they satisfy and enable the principle of legality and proclamation within a State and give (ideally) ample and sufficient information to the public at large about the existence of a crisis and the specific legal means

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[12] See A/36/40, annex VII, general comment 5/13.

[13] See Jaime Oraá, *Human Rights in States of Emergency in International Law* (Oxford, Clarendon Press, 1992), p. 21.

[14] See Human Rights Committee general comment No. 29 (2001) on states of emergency, para. 2.

[15] See, for example, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Argentina* (OEA/Ser. L/V/II.49, Doc. 19 corr. 1) (April 1980).

[16] See Inter-American Court of Human rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 (OEA/Ser.L/V/111.17, Doc. 13) (January 1987), para. 19.

[17] See General Assembly resolution 56/83, annex, Responsibility of States for internationally wrongful acts, art. 32.

[18] See, for example, article 141A (Emergency Provisions) of the Constitution of Bangladesh, inserted by the Constitution (Second Amendment) Act 1973, which entrusts the President with the responsibility of proclaiming an emergency if the life of the nation is threatened by "war or external aggression or internal disturbance".

[19] See John Ferejohn and Pasquale Pasquino, "The law of the exception: a typology of emergency powers", *International Journal of Constitutional Law*, vol. 2, No. 2 (April 2004), pp. 210–239.

being used to address the challenges faced. Failure to follow the domestic legal procedures on the declaration of emergencies, including emergencies triggered by terrorism, is an indication of a lack of accountability and transparency within national systems and weakness in the rule of law.

19. The Special Rapporteur points out that supranational legal regulation, including such devices as Security Council resolutions and European Union directives, can impinge on the prerogatives of national legal systems and undermine procedural and rights-based protections entrenched in national law that are designed precisely to protect against overreach by emergency powers. The Special Rapporteur affirms that international practice by supranational bodies addressing terrorism must not impinge on the protection of rights in national constitutions and national procedures. This caution needs to be borne in mind given the increasingly dense production of global regulation relating to counter-terrorism and violent extremism, which is often deaf to domestic human rights protections and procedures that amplify and support rights.

20. Moreover, the Special Rapporteur is concerned about the ways in which international obligations are used as a rationale for failing to conform to domestic human rights standards. International legal regulation should support — not undercut — domestic protections for human rights. Given the adoption of multiple Security Council resolutions added to the variety of soft law regulations, the Special Rapporteur observes that new forms of counter-terrorism regulation expressly work around or limit the full operation of domestic legal constraints designed to protect human rights at the national level. Specifically, supranational legal dictates are failing to pay attention to the legality requirements of national legal systems.[20] In parallel, the Special Rapporteur notes that the use of ordinary counter-terrorism law as a vehicle for substantive and far-reaching restrictions on human rights circumvents the requirements of international law. It should also be remarked that governments are regularly fast-tracking extensive counter-terrorism legislation, leaving little time for consideration of the impact on rights, obfuscating compliance with international human rights law obligations and entrenching permanent securitization.

II. Declaration of emergency and the problem of de facto emergencies

A. International law obligations and declaration

21. An uncontroversial principle governing the use of emergency powers is that the existence of an emergency and the modification of legal regulation affecting the exercise of human rights be public and notified. In general, declarations of emergency in international treaty law require speedy formal notification of derogation to other States parties when a State is taking express measures to limit the full protection of human rights under domestic law. States should also identify the measures taken and their effect on the enjoyment of the rights and freedoms contained in particular treaty articles. The International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights require States to provide the reasons for derogation. The communication should normally be submitted to the treaty depository. Another communication should be submitted when the State terminates the derogation. The Covenant and the European and American conventions all require that rights protection be fully restored when derogation ends.

22. Derogation constitutes a treaty obligation for States parties to international human rights treaties when certain conditions are met. The Special Rapporteur affirms the obligatory dimensions of derogation as necessary for transparency and accountability when

[20] See Kim Lane Scheppele, "The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency" in *The Migration of Constitutional Ideas*, Sujit Choudhry, ed. (Cambridge University Press, 2006).

States exercise emergency powers. Specifically, derogation applies when counter-terrorism laws enable the use of emergency powers and/or function as a form of de facto emergency that substantially affects the full enjoyment of human rights. The failure to derogate creates grey zones of State practice. It leaves open the possibility for abuse of emergency powers premised on the actuality or threat of terrorism and undermines the integrity of human rights obligations.

23. The second procedural prong of derogation is the requirement of proclamation, which is closely linked to the goal of legality. States utilizing emergency powers, whether displacing the ordinary law to address a crisis or using the ordinary law as a vehicle to limit the full exercise of human rights, have an obligation to inform their citizens and those subject to their jurisdiction that the legal rules have changed. Proclamation promotes rule of law, transparency and the possibility of contestation if the emergency powers are excessive, disproportionate or at odds with other legal rules in the jurisdiction. The Special Rapporteur underscores that, for States that have not signed the International Covenant on Civil and Political Rights or other relevant regional human rights conventions, emergency proclamation remains essential good practice. It reaffirms the broader obligations to human rights protections contained in customary international law that apply in both war and peace times.

24. Domestically, many States have the requirement of proclamation. Proclamation must be meaningful and more than merely procedural to the internal workings of Government. Proclamation must be provided by a clear and accessible source, and be public, available and understandable to the public at large. Good practice by States would ensure that proclamation is undertaken in all the official languages of the State, as well as in languages used by a broad segment of the population. Given that the counter-terrorism laws increasingly involve criminal regulation of activities that might not previously have been deemed criminal acts by States, together with ever-widening national definitions of terrorism,[21] the Special Rapporteur underscores the importance of meaningful notification as being essential to the fulfilment of the principle of *nullem crimen sine lege*.

25. The exercise of emergency powers, including those provided for in counter-terrorism legislation, or executive action must be consistent with each State's other obligations under international law, including the law of armed conflict, international criminal law and international refugee law.[22]

B. International oversight of declaration of emergency

26. In practice, notification and proclamation have two limitations. The first is the "check-box" approach that seems to follow when an emergency is communicated by a State party. The treaty depositories and the human rights bodies monitoring the implementation of the treaties have rarely taken the notification as a basis for robust engagement with States. This includes notifications that raise questions as to the legality, legitimacy, proportionality and necessity of the measures taken — with some notable exceptions. The hesitancy of human rights treaty bodies to confront troubling derogation practices from the outset stems from a historic deference to the State's assessment of threat. The Special Rapporteur takes the view that this culture of accommodation is in acute need of revision to address the widespread abuse of emergency powers, the practice of utilizing emergency powers in the absence of a sustained domestic interrogation of their necessity and the overlap between states of emergency and high level of human rights violations. In the context of emergencies, international organizations need to foster a culture and practice of public justification by States. This shift in policy and practice is consistent with the requirements of human rights treaties and would serve the long-term security interests of

[21] For example, in 2016, the president of Hungary endorsed a package of counter-terrorism measures, including a sixth amendment to the Constitution and amendments to laws governing the police, national security services and the defence forces. The law is premised on the concept of "terror threat situation" which is ill-defined in the legislation.

[22] See A/71/384.

States as it would provide a robust, legal basis for the legitimate use of emergency powers, and enable early engagement with States that abuse the emergency privilege.

27. Second, many States no longer formally derogate from their human rights treaty obligations — even in contexts where their actions reflect de facto suspensions of derogable and non-derogable rights. Such non-derogation occurs notwithstanding the extensive use of exceptional national security or emergency powers which have the equivalent effect, in practice, of creating emergency practices and conditions in response to terrorism. Treaty bodies have been ill-informed and under-notified of the consequences of State counter-terrorism measures for rights protection. This failure to derogate is a serious and emerging practice that must be addressed in order to ensure legal oversight of emergency powers. Derogation and emergency practice is entering a new and — arguably — more insidious phase of human rights limitations in the name of advancing security. Normalizing the exception[23] is taking on new pathways. In particular, the Special Rapporteur highlights the use of ordinary law as the most common vehicle for counter-terrorism legislation. This creates sustained and enduring situations of emergency at the national level, with severe and frequently unjustified restrictions on many non-derogable rights. This is a highly problematic arena of State practice in which the lack of notification and proclamation contributes to a broader lack of accountability and oversight.

C. State obligations when declaring emergencies

28. Derogation requires information-sharing with the relevant treaty depositories, treaty bodies and States parties in a timely manner. As the jurisprudence of various human rights treaty bodies has consistently affirmed, States must apply the tests of legitimacy, proportionality and necessity when choosing measures in response to crisis. Where possible and appropriate, ordinary law should be used to regulate political challengers. It bears reminding that it is the strength and endurance of the ordinary rule of law that is as much under attack from terrorism as any concrete physical target. States are positioned to supplement, if necessary, the ordinary law through the application of human rights-based limitations or restrictions (subject to over-riding non-discrimination, proportionality and necessity requirements). State obligations are no different whether the threat emanates from terrorism, natural disaster or war. Moreover, States must ensure that the measures taken do not have an adverse impact on minorities and vulnerable groups (including women and children) and do not affect religious, ethnic or identified social groups in selective or discriminatory ways. The Special Rapporteur considers it good practice for States to affirm that such non-discrimination-based benchmarking has been undertaken and satisfied when notifying an emergency.

29. The Special Rapporteur calls upon States to adhere to their human rights treaty obligations when resorting to national security or counter-terrorism or emergency powers. The Special Rapporteur calls upon the human rights treaty bodies and international oversight entities to pay particular attention to the procedural requirements of derogation in the context of counter-terrorism, specifically, the necessity for States to give notification of measures taken. Where a State fails to provide sufficient information, procedures for follow-up and dialogue should be robust and fully engaged.

D. Hidden, de facto and complex emergencies

30. De facto states of emergency are situations of emergency that are frequently hidden by the exercise of restrictive powers without formal acknowledgment of the existence of an emergency.[24] A number of examples illustrate that practice. First, an initial passage of

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[23] See Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006).

[24] See International Commission of Jurists, *States of Emergency — Their Impact on Human Rights: A Comparative Study by the International Commission of Jurists* (Geneva, 1983), p. 413. More recently a number of States have not submitted derogations despite evidence of breach of the International

emergency legislation into law with explicit time restrictions, including, perhaps, a sunset clause, is followed by the translation of the same or equivalent emergency powers into ordinary legislation, but without the word "emergency" in the title of the legislation. This is a somewhat deceptive legal approach, whereby the overlap between the emergency legislation and the ordinary legislation is factually extensive and undeniable, but the title and the illusion of a regular legislative process have the effect of cloaking the legislation as ordinary, not exceptional. The Special Rapporteur affirms that it is not only the title of the legislation that confers emergency status, but also the scope, impact and rights-limiting nature of the legislation which gives it an "emergency" characteristic.

31. Second, there is the increased tendency on the part of States to pass, ab initio, ordinary legislation that is exceptional in character and scope, premised on the fact or threat of a terrorist atrocity, which foregoes the subterfuge that it is a finite emergency piece of legislation and commits the State to long-term exceptionality.

32. Third, some countries are using the device of "reserve" powers in their ordinary legislation, that is, counter-terrorism laws that provide for exceptional measures when the Government deems them necessary, so that the need for a formal declaration of emergency is bypassed.[25]

33. Fourth, overreliance on and abuse of limitation clauses contribute sizeably to the phenomena of de facto emergencies. States invoke clauses such as national security and safety as a basis for the usurpation of rights in the context of countering terrorism. However, national legislation frequently contains vague definitions of terrorism, and broadly target core human rights, including the rights to life, liberty and security, due process, fair trial, freedom of speech, peaceful assembly and association, and religion or belief. The deference to the use of limitation clauses together with a lack of long-term appreciation for the cumulative effect of such reliance on the integrity of the rule of law must be robustly addressed.

34. Fifth, an acute form of de facto emergency practice is created, which bypasses explicit legislative authorization entirely. Here, governments rely predominantly or exclusively on executive powers to regulate terrorism and enable counter-terrorism responses.

35. Finally, a new pattern of what are termed "covert" emergencies should be noted.[26] A covert emergency includes the subtle persuasion of parliaments and courts to acquiesce to "the minimal interpretations of certain [human] rights that stripped [the rights] of much of their content. This tactic has the effect of, at worst, seeking to create effective covert derogations and, at best, redefining the rights so that they emerged only in a diluted form of practice."[27] To enable this, State tactics include simple assurances to parliamentarians that the measures taken are compliant with human rights treaty obligations or for those who are more inquiring, the executive issues assurances that the measures involve only partial minimization of rights that is justified by the necessity of the exceptional threat posed by terrorists. These assurances are often merely rhetorical and not supported by a review of actual legislation and the substance of human rights implications.

36. Expansive counter-terrorism law is now the ordinary law in many States.[28] Such laws often use the word terrorism, with no guidance as to its definition, and it is increasingly coupled with terms such as "violent extremism" and "radicalization", which are also offered without definitions. Many domestic legislative enactments are

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Covenant on Civil and Political Rights. See Fionnuala Ní Aoláin, "The cloak and dagger game of emergency and war" in *Human Rights in Emergencies*, Evan J. Criddle, ed. (Cambridge University Press, 2016).

[25] See Amnesty International, "Dangerously disproportionate: the ever-expanding security state in Europe" (January 2017), p. 13.

[26] See Helen Fenwick and Gavin Phillipson, "Covert derogations and judicial deference: redefining liberty and due process rights in counterterrorism law and beyond", *McGill Law Journal*, vol. 56, No. 4 (June 2011), p. 863.

[27] Ibid, p. 867.

[28] See Kent Roach, ed., *Comparative Counter-Terrorism Law* (Cambridge University Press, 2015).

characterized by wide-ranging and vague definitions of terrorism, including definitions that limit both the valid application of international humanitarian law to conflicts covered by the provisions of common article 3 of the 1949 Geneva Conventions and Additional Protocol II threshold conflicts as well as the recognition of legitimate self-determination claims under human rights treaties. Definitional lacunae compound the challenge of confronting de facto emergencies.

37. Complex emergencies are a distinct and under-appreciated dimension of emergency practice in counter-terrorism contexts. Complex emergencies evolve from the piling up of multiple forms of legislation and administrative practice, including constitutional exercises of emergency powers, combined with legislative counter-terrorism measures and mingled with devolved uses of emergency powers in federal systems (regional, state and local governments in particular), which create a complex and overlapping mosaic of legal regulation. Complex emergencies require close and sustained oversight by international human rights oversight bodies. Mapping the totality of the counter-terrorism terrain is essential; that means not only seeing individual pieces of legislation or executive orders, but understanding the cumulative effect of such regulation on the total enjoyment of human rights.

38. International human rights bodies have highlighted the problem of de facto emergencies and expressly called upon States to declare or abandon their hidden emergency practices.[29] Given the widespread use of ordinary counter-terrorism laws that significantly limit or impinge upon the full enjoyment of human rights, greater attention needs to be paid by all relevant oversight bodies to the de facto and complex expansion of emergency powers through the use of counter-terrorism law. Failure to fully name and recognize national counter-terrorism regimes as holding devices for states of emergency is a fundamental weakness in ensuring human rights protection in all circumstances.

39. The Special Rapporteur urges States, the Security Council and the Counter-Terrorism Committee to be aware of and remind those States creating new supranational legal obligations that substantial limitations on the exercise of the rights implicate emergencies and generic affirmations of protecting human rights are insufficient. Rather, States have specific and concrete human rights obligations when emergency powers are triggered by counter-terrorism law and practice. Undeniably, all counter-terrorism measures that implicate emergency measures that significantly limit or impinge upon the full enjoyment of human rights must be regulated by transparent and specific national norms that establish a clear mechanism for triggering those measures, in full compliance with States' international human rights obligations.

III. Human rights protection measures that must be taken in states of emergency

40. Under international law, States have obligations and duties to respect, protect and fulfil human rights and fundamental freedoms. During an emergency — no matter how it is occasioned — if the situation constitutes a threat to the life of the nation and its exigencies require suspension of certain international human rights, such action must be taken while fulfilling State's obligations under international law.

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[29] In examining a 21-year emergency in Egypt, in 2002, the Human Rights Committee urged the State party to consider reviewing the need to maintain the state of emergency (CCPR/CO/76/EGY, para. 6). In considering the 38-year emergency in the Syrian Arab Republic, in 2001, the Committee recommended that the state of emergency be formally lifted as soon as possible (CCPR/CO/71/SYR, para. 6). In relation to India, in 1997, the Committee regretted that some parts of the country had remained subject to declaration as disturbed areas for many years. For example, the Armed Forces (Special Powers) Act had been applied throughout one state for over 17 years (since 1980) and that in those areas State party was in effect using emergency powers without resorting to article 4, paragraph 3 of the Covenant (CCPR/C/79/Add.81, para. 19). The Committee has also more generally called out the resort to de facto emergencies by States. See CCPR/C/79/Add.42, para. 9; CCPR/C/79/Add.62, para. 11; and CCPR/C/79/Add.19, para. 8.

A. Which rights cannot be limited or suspended

41. Only derogable rights may be subject to limitations during an emergency. Non-derogable rights are rights that are especially protected under treaty law that cannot be limited or suspended, regardless of the extent or the source of the crisis faced by the State. There is some variance across treaties on what constitute non-derogable rights. The International Covenant on Civil and Political Rights does not permit derogation on the arbitrary deprivation of life, freedom from torture, inhuman and degrading treatment, slavery and servitude, imprisonment for the inability to fulfil contractual obligations, application of ex post facto laws and freedom of thought, conscience and religion. The European Convention on Human Rights contains minimal provisions on non-derogable rights, including the right to life (except in respect of death resulting from lawful acts of war), freedom from torture, inhuman and degrading treatment, freedom from slavery and the right not to be subject to post facto application of the law.

42. The Human Rights Committee has paid particular attention to derogations from derogable rights and stressed that their derogable status does not mean that they can be derogated from at will.[30] This approach has a relevant cross-application to the approach of the Inter-American Court which, in two important advisory opinion decisions, found that certain derogable rights under the American Convention are effectively rendered non-derogable by expansive interpretation of the term "judicial guarantees" in article 27 of the American Convention.[31] Another important extension of protection for derogable rights in times of emergency has been undertaken by the Human Rights Committee, which holds that derogable rights which also constitute peremptory norms of international law are effectively non-derogable in emergencies. Moreover, the Committee stated that derogation from certain rights could never — in its view — be proportionate (for example, hostage taking, arbitrary deprivation of liberty, deviation from the principles of fair trial).[32] The Special Rapporteur concurs with this position.

B. Balance, necessity and proportionality in limiting rights while countering terrorism

43. Derogation is not a blanket mechanism. States must reach the same threshold of necessity and proportionality for each measure taken, and each measure shall be "directed to an actual, clear, present or imminent danger".[33] Simply put, each counter-terrorism measure taken by a State that functions as an emergency power by modifying the existing protection of human rights under the ordinary law must be measured by the same tests and requirements.

44. The implementation of proportionality requirements is varied across treaty bodies (for example, the European Court of Human Rights uses the "the margin of appreciation" doctrine.[34] While recognizing the need to give States necessary flexibility when dealing with a crisis situation triggered by acts of terrorism, the Special Rapporteur stresses that the longer or more entrenched the emergency, the narrower the margin of deference that should

[30] See the Committee's general comment No. 29, para. 6. See also, general comment No. 35 (2014) on liberty and security of person, paras. 65–66.

[31] See Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87* (October 1987) (OEA/Ser.L/V/III.9, doc. 13), p. 40; and *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87* (January 1987) (OEA/Ser.L/V/III.17, doc. 13), p. 33.

[32] See Human Rights Committee general comment No. 29, para. 11.

[33] See the Siracusa Principles on the Limitation and derogation of Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex), principle 9.

[34] Oren Gross and Fionnuala Ni Aoláin, "From discretion to scrutiny: revisiting the application of the margin of appreciation doctrine in the context of article 15 of the European Convention on Human Rights", *Human Rights Quarterly*, vol. 23, No. 3 (2001), pp. 625–649.

to be ceded to State, particularly when there is sustained evidence of systematic human rights violations resulting from the counter-terrorism and/or emergency measures.

45. The Special Rapporteur expresses concern at counter-terrorism laws that facially appear to impinge particularly on the principles of legality, fair trial and the freedom of thought, conscience and religion. Core aspects of these rights are effectively non-derogable and compromises on these rights have consequential effects on the most basic of human entitlements.

46. States must demonstrate that resorting to emergency powers is strictly necessary to implementing counter-terrorism measures that limit the exercise of human rights.[35] Generic exhortations to an unspecified threat of terrorism do not meet this standard. States must expressly demonstrate what the precise nature of the threat involves to them when deploying exceptional legal measures affecting the full enjoyment of human rights. States parties have "a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation."[36]

47. New counter-terrorism laws across the globe that criminalize freedom of expression or views that appear to praise, glorify, support, defend, apologize for or that seek to justify acts defined as "terrorism" under domestic law implicate both serious concerns of legality and limitations on freedom of thought and expression. The application of such provisions has been targeted at, inter alia, the legitimate activities of political opposition, critics, dissidents, civil society, human rights defenders, lawyers, religious clerics, bloggers, artists, musicians and others. Furthermore, the non-violent criticism of State policies or institutions, including the judiciary, should not be made a criminal offence under counter-terrorism measures in any society governed by rule of law and abiding by human rights principles and obligations.

48. While countering terrorism, violent extremism and other State security offences, States may impose limitations on rights and freedoms but only such "as are determined by law and solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of security, morality, public order and the general welfare in a democratic society".[37] Emergency or not, States must reach the same threshold of legality, legitimacy, necessity and proportionality for each measure taken, and each measure shall be "directed to an actual, clear, present or imminent danger."[38] The measures taken must be the least intrusive possible to achieve their objective.

49. Importantly, the discretion granted to States is not unfettered. Emergency powers must be fine-tailored to an immediate and urgent crisis and not be used as a means to limit legitimate dissent, protest, expression and the work of civil society. That risks violating, inter alia, fair trial and due process guarantees, the prohibition of torture and even the right to life. The principle of non-discrimination must always be respected and special effort must be made to safeguard the rights of vulnerable groups. Counter-terrorism measures targeting specific ethnic or religious groups are in breach of States' human rights obligations.

50. The European Court of Human Rights has taken a robust and highly engaged approach to addressing the necessity and proportionality of measures taken by States, specifically in the context of countering terrorism. For example, in *Ocalan v. Turkey*, the Court found that while the investigation of terrorist offences undoubtedly presented the authorities with special problems, "this does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from

[35] See European Court of Human Rights, *James and Others v. the United Kingdom* (application No. 8793/79), judgment of 21 February 1986, para. 50, and *Refah Partisi (the Welfare Party) and Others v. Turkey*, judgment of 13 February 2003, para. 133.

[36] See Human Rights Committee general comment No. 29, para. 6.

[37] See Universal Declaration of Human Rights, art. 29 (2).

[38] See the Siracusa Principles, principle 9.

effective control by the domestic courts."[39] In *Al-Nashif v. Bulgaria*, a case concerning deportation and detention, the Court determined that national authorities could not "do away with" effective control of the lawfulness of detention by choosing to assert that national security and terrorism were involved.[40] The Special Rapporteur endorses and supports these robust judicial approaches.

C. Domestic and international oversight of emergency powers

51. Oversight of counter-terrorism measures is essential to ensure that human rights are protected as States respond to the actuality or threat of terrorism. States must ensure a range of domestic measures to protect human rights during emergency, which are supplemented by international oversight.

52. The Special Rapporteur considers it is imperative that domestic and international oversight be attuned to the overlap between counter-terrorism regulation and the exercise of emergency powers — whether formal or de facto. For too long, since 9/11, it was assumed incorrectly that counter-terrorism measures did not implicate emergency practice as the specificity of "emergency" was not in the title, operation and reporting of such measures.

53. The Special Rapporteur underscores that States have a legal obligation under international human rights law to disclose and notify, as well as fulfil, their human rights treaty obligations, including where counter-terrorism measures correspond to or have the same effect as emergency powers. The Special Rapporteur affirms that international human rights bodies have an obligation to prompt the notification of, remind about and review counter-terrorism measures as emergency powers and practice when those measures have emergency effect in law and in practice. As will be detailed below, the more entrenched and permanent such measures become, the more compelling the obligations of oversight and the narrower the discretion to States.

IV. Ending emergencies

54. The exercise of emergency powers is finite and their regulation by international law is intended as a means to limit and end reliance on their exceptional exercise. Counter-intuitively, the goal of emergency exceptionality is to create and sustain the means to return to normal legal regulation. Legal regulation by regular means promotes an open and transparent Government, affirms accountability and is correlated with lower statistical levels of human rights violations.

55. How are emergency powers best ended? First, emergency powers are least likely to persist when they are tailor-made to a specific and defined crisis. The obviousness of the end of the crisis will be signalled more strongly by the bespoke construction of the exceptional powers used. Second, emergency powers that are subject to robust domestic and international oversight are less likely to persist and become permanent, not least because the signals to States, security agencies, courts and other enforcers of modified legal rules will make it clear when governments have overstepped the limits of permissible emergency regulation. Third, emergency powers are easier to end when they are not hidden in the ordinary law.

56. Therefore, incentivizing the end of emergency regulation and affirming the capacity of the ordinary legal system to cope with challenge should be a dual priority for States. Making the exercise of emergency powers and counter-terrorism regulation an ongoing area of scrutiny and attention for States is apt to create the kind of incentives likely to encourage States to use ordinary law. When the resort to emergency powers through counter-terrorism law lacks meaningful oversight, scrutiny, independent evaluation and robust benchmarking,

[39] See European Court of Human Rights *Ocalan v. Turkey*, application 46221/99, judgment of 12 March 2003, para. 106.

[40] Ibid., *Al-Nashif v. Bulgaria*, application No. 50963/99, judgment of 20 June 2002, paras. 94 and 123–124.

the incentives will play the other way, and States and security sector institutions will find emergency powers attractive because they offer shortcuts.

V. Prohibition of permanent and complex emergency powers

57. Permanent and complex emergencies are deeply troubling for the protection of human rights. There is robust empirical data stretching back over multiple decades that indisputably demonstrate the nexus between situations of extended emergency and serious, sustained human rights violations. Recent post-9/11 studies provide comprehensive data analysis in this respect.[41] The data also affirm a troubling pattern, namely that non-derogable rights become more vulnerable to erosion and lack of protection during states of emergency, with prohibition on extrajudicial killing being particularly at risk of increased violation. The special procedures mechanisms of the Human Rights Council have had increased and sustained engagement with countries that have emergencies in play, particularly when those powers enable counter-terrorism regulation and have triggered widespread allegations of human rights violation.[42] Independent civil society and human rights organization reporting from multiple countries have given concrete and detailed breakdowns on the incidence of serious human rights violations in States that have used exceptional legal powers over the long haul.

58. Clearly, international law does not allow the permanent use of emergency powers that implicate indefinite imposition of larger restrictions or suspension of human rights and fundamental freedoms. Moreover, even when allowed, the routine extensions for many years or even decades of states of emergency amount to permanent emergencies, which pose significant challenges to the effective protection of human rights.

59. The indefinite use of emergency powers through counter-terrorism legislation and administrative practice invariably "infects" the totality of the ordinary legal system. The longer the crisis, the greater the possibility that the exceptional measures contained in counter-terrorism legislation to deal with real or alleged terrorist acts will insidiously creep over into the ordinary law. As the duration of emergencies increases, it becomes harder to seal off those parts of security, intelligence and policing systems that operate in one way under counter-terrorism legislation from the ordinary criminal justice system that deals with ordinary crimes. Numerous examples can be cited, including the erosion of the right to silence and the use of special or specialized criminal courts in some countries, which are initially for terrorist suspects only, but are then widened to accommodate other crimes and criminal gangs implicating broader sites of State security.[43]

60. In parallel, great care should be taken when expansive and powerful counter-terrorism legislation or administrative practice are implemented to deal with particular parts of a territory, because it can seep across entire jurisdictions. As history demonstrates, different legal principles, rules and norms applied in distinct geographical areas that belong to the same "control system"[44] do not remain insulated for long, but invariably seep across territorial and administrative boundaries. It has been consistently demonstrated that "anomalous" zones threaten to subvert fundamental values in the larger legal system and undermine the broader rule of law. Expansive reach and breadth of contemporary counter-terrorism norms should provide pause, given the global evidence of long-term effects of

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[41] See Eric Neumayer, "Do governments mean business when they derogate? Human rights violations during notified states of emergency", *The Review of International Organizations*, vol. 8, No. 1 (March 2013); and David L. Richards and K. Chad Clay, "An umbrella with holes: respect for non-derogable human rights during declared states of emergency, 1996–2004", *Human Rights Review*, vol. 13, No. 4 (December 2012), pp. 443–471.

[42] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22390&LangID=E.

[43] See Fergal F. Davis, *The History and Development of the Special Criminal Court, 1922–2005*, (Four Courts Press, 2007).

[44] See Baruch Kimmerling, "Boundaries and frontiers of the Israeli control system: Analytical conclusions" in *The Israeli State and Society: Boundaries and Frontiers*, Baruch Kimmerling, ed. (State Universaty of New York Press, 1989), pp. 265, 266–67.

exceptional legal powers on the integrity of legal systems and the rights of citizens, and underscore the need for greater transparency and accountability.

61. Counter-terrorism legislation that appears facially neutral and whose wide-ranging and rights-limiting provisions theoretically apply equally to all are invariably and unfortunately targeted at distinct groups and minorities. When counter-terrorism legislation is permanent, it entrenches legal distinctions and discriminations against minorities and distinct social groups and creates patterns of anomie, exclusion and broader social discrimination, and has been recognized as part of the negative legal landscape that feeds violent extremism.[45] Permanent counter-terrorism legislation and administrative practice that normalizes the diminution of rights for certain groups has long-term costs, increasingly affirmed by practitioners and experts in the field of countering and preventing violent extremism. Counter-terrorism norms that permanently limit rights are not a shortcut worth taking if States are genuinely committed to taking on the conditions that produce and sustain extremism and mobilization.

62. The Special Rapporteur again stresses that complex emergencies require close and sustained oversight by international human rights oversight bodies. The cumulative effect of overlapping permanent and complex emergencies makes accountability and oversight of emergency powers difficult. Overcoming these accountability challenges means paying close attention to the various forms in which counter-terrorism and emergency practice overlap and reinforce each other.

VI. Post-9/11 practices

A. Declarations of war and states of emergency

63. In the aftermath of the 9/11 attacks, the United States of America executive declared a "global war on terror".[46] While as a formal matter, that language was largely repudiated by subsequent United States administrations, it became the basis for a set of global and national practices, whereby some of customary distinctions between war and peace have melted away.[47] Recalling that human rights law considers war as a justified legal basis for the declaration of emergency — although an armed conflict does not per se automatically justify a state of emergency — the post-9/11 articulations of fighting a global war on terror may have muddied the legal and rhetorical waters on the legal basis for emergency powers. Compounding this complex legal mosaic has been the use of Security Council resolutions as a legal super highway to regulate the challenge of terrorism.

64. Certain countries have also authorized the use of force and a range of broad extra-territorial actions based on the global threat of terrorism.[48] Such authorization, in the form of domestic legislative devices, effectively constructs a state of war "all the time" but also "everywhere".[49] The notion of war that is at play in continually renewed domestic legislation, specifically legislation authorizing the use of force indefinitely in other territories, can also be understood as an exceptional piece of permanent emergency

[45] See United Nations Development Programme, *Journey to Extremism in Africa: Drivers, Incentives and the Tipping Point* (2017). Available at http://journey-to-extremism.undp.org/content/downloads/UNDP-JourneyToExtremism-report-2017-english.pdf. See also Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (Pluto Press — NCCL/Liberty, 1993).

[46] See www.state.gov/documents/organization/63562.pdf.

[47] See Rosa Brooks, *How Everything Became War and the Military Became Everything* (New York, Simon & Schuster, 2016).

[48] See, for example, United States of America, Public Law 107-40 of 18 September 2001 (115 Stat. 224), passed as Senate Joint Resolution 23 on 14 September 2001, which authorizes the use of United States Armed Forces against those responsible for the attacks on September 11, 2001 and any "associated forces". See also United States Court of Appeals, *Barhoumi v. Obama*, decision of 11 June 2010.

[49] See Clive Walker, "Prisoners of 'war all the time'", *European Human Rights Law Review* (2005).

legislation with broad and deep reach into numerous countries around the globe where the military forces of the State are engaged.

65. As noted previously, in a series of resolutions, the Security Council has recognized that terrorism constitutes a threat to international peace and security,[50] and has authorized and required a series of actions in response to that threat. Whereas such decrees to address legal lacunae enable the regulation of specific terrorist actions and actors, they are not a legitimate basis for creating a global legal state of emergency. However, it must be recognized that the legal effect of Security Council resolutions as translated into the law of many States has been to enable, extend and validate exceptional states of emergency.

66. Counter-terrorism legislation and practice specifically premised on Security Council resolutions have, in many countries, upended or shortcut the usual mechanisms for creating exceptional laws and enabled States to produce expansive, vague and highly controversial definitions of terrorism, which not only implement the core imperatives of Security Council resolutions, but have been further used to quell legitimate domestic protest, snuff out political organizing and undermine lawful expression. In a number of those cases, it remains unproven that the specific domestic terrorist threat meets the objective threshold of a "threat to the life of the nation" or undermines the essential security of the State. The Special Rapporteur reminds States that Security Council resolutions on counter-terrorism are not a carte blanche for the denial of human rights nor are they cover for nefarious political action unrelated to the specific content of the resolutions. The Special Rapporteur notes that such practices contradict the United Nations Global Counter-Terrorism Strategy — more specifically, pillar IV, which requires human rights and the rule of law to be fully protected while countering terrorism.

B. Extra-territorial use of emergency powers

67. No State has ever derogated from an international human rights treaty based on the extraterritorial deployment of its military forces overseas.[51] However, any overseas military deployment, as one of the measures taken individually or collectively by States to eliminate international terrorism, is regulated by the respective national or international rules of engagement, which must be in compliance with international law, in particular international human rights law, refugee law and humanitarian law.[52]

68. States have considered the feasibility of "presumptive derogations for armed forces in overseas operations".[53] The Special Rapporteur takes the view that while such derogations are not per se impossible, extraterritorial application requires fulfilling the requirements, based on actual facts on the ground, of the "threat to the life of the nation", "time of war" and "public danger or other emergency that threatens the independence or security of a State". In *Lawless v. Ireland*, the European Court of Human Rights upheld the validity of a derogation by Ireland based on, inter alia, the operation of "a secret army … also operating outside the territory of the state".[54] Despite the extraterritorial dimension of this derogation, it should be noted that the primary test of threat was satisfied by the "existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence".

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[50] See Security Council resolutions 1373 (2001), 1456 (2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017).

[51] See Marko Milanovic, "Extraterritorial derogations from human rights treaties in armed conflict", in *The Frontiers of Human Rights: Extraterritoriality and its Challenges*, Nehal Bhuta, ed. (Oxford University Press, 2014).

[52] See Security Council resolutions 1373 (2001), 1456 (2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017); General Assembly resolutions 49/60, 51/210, 72/123 and 72/180; and Human Rights Council resolution 35/34.

[53] See, for example, United Kingdom, Ministry of Defence, "Government to Protect Armed Forces from persistent legal claims in future overseas operations" (4 October 2016).

[54] See *Lawless v. Ireland*, para. 28.

69. In the context of extraterritorial derogation, the facts on the ground would include a review by the relevant human rights body as to whether a war — specifically an international or non-international armed conflict — exists and is sufficient to justify derogation. Moreover, when States enter into overseas military operations voluntarily and can withdraw from those operations at any point, the necessity of blanket derogation seems at odds with political circumstances which engage the use of military force.

70. Derogation is not a vaccination against potential and unrealized threats for States, rather it is exercised in the context of actualized, concrete and measurable threats to a State. The Special Rapporteur takes the view that presumptive derogations are per se incompatible with the strict requirements of all the relevant human rights treaties, as any derogation must be individually justified by the contextual specificities surrounding the overseas engagement of State forces.

71. Where a State might derogate based on its extraterritorial actions, including but not limited to conflict in another territory, the measures taken would have to be necessary and proportionate to the exigencies of the situation and, of course, certain rights are entirely non-derogable.[55] Some courts have taken the view that, in the context of non-international armed conflicts, if a human rights jurisdiction is established and no lawful derogation is made, the full force of protections under the right to liberty are upheld.[56] The Special Rapporteur broadly concurs with this view and affirms that a derogation would not lower the protections of the right to liberty below those stipulated by international human rights and humanitarian law.

VII. Conclusions and recommendations

72. **States of emergency remain a pernicious and under-supervised source of human rights violations globally. The reach and breadth of counter-terrorism law that enables de facto, complex and permanent states of emergency must be recognized and robustly regulated.**

73. **States must fulfil their international law obligations when derogating from applicable human rights treaty obligations when counter-terrorism law and practices operate to suspend the full and effective enjoyment of human rights within their territories.**

74. **States must ensure, when revising existing, or drafting new, counter-terrorism legislation, that they meet the thresholds of legality, legitimacy, necessity and proportionality as set out by international law to ensure that emergency measures are in compliance with the prohibition of permanent emergency powers.**

75. **States must undertake robust and meaningful periodic review of their counter-terrorism legislation to assess whether the effect on the enjoyment of human rights is necessary and proportionate. These reviews must address the cumulative impact of a State's counter-terrorism measures which may, in sum, be disproportionate to the exigencies of the situation. Countries such as the United Kingdom of Great Britain and Northern Ireland are to be commended for their consistent commitment to the Independent Reviewer of Terrorism Legislation in providing stellar and much needed guidance and precedent to other States.[57] States are encouraged to follow this example**

[55] Thus, for example, derogations that might relate to non-international armed conflicts are not exempt from the requirement that the conflict elsewhere must pose a "threat to the life of the nation" (emphasis added). See Alan Greene, "Separating normalcy from emergency: the jurisprudence of article 15 of the European Convention on Human Rights", *German Law Journal*, vol. 12, No. 10 (2011), pp. 1764–1785.

[56] See European Court of Human Rights, *Al-Jedda v. the United Kingdom*, judgment of 7 July 2011; and *Al-Skeini and Others v. the United Kingdom*, judgment of 7 July 2011.

[57] See https://terrorismlegislationreviewer.independent.gov.uk. See also the Independent National Security Legislation Monitor adopted by Australia as a parallel model of good practice.

to enable independent and expert counter-terrorism oversight that addresses the entire counter-terrorism landscape in each State.

76. **States should ensure that the stated deadlines to end emergency powers are met.**

77. **States utilizing counter-terrorism laws that result in states of emergency must maintain robust and independent judicial access and oversight. Judicial oversight is necessary at all phases of the emergency powers practice and the longer the emergency, the more compelling and important the need for judicial review.**[58]

78. **When a State deploys counter-terrorism laws as functional emergency powers, it remains under an absolute obligation to protect non-derogable rights (such as freedom from torture). Moreover, derogable rights that are intrinsically essential to the enforcement of non-derogable rights must be maintained (such as State obligations to ensure effective investigations through the protection of due process). Procedural rights that enable contestation, debate and review of emergency powers are critical to the protection of human rights, the protection of civic space and to sustaining tolerance, openness and human dignity in situations of emergency.**

79. **The Special Rapporteur is concerned that current reviews found within the United Nations counter-terrorism architecture that are focused on meeting the compliance obligations set out in Security Council resolution 1373 reward States for producing more forceful counter-terrorism legislation and administrative practice with little meaningful assessment of the cost to the State if human rights are adversely affected in the process. Lip service to human rights norms in Security Council resolutions are a fundamental failure of leadership in counter-terrorism regulation and supranational regulation can and should do better.**

80. **Understanding that when counter-terrorism law functions as emergency law, States must pay particular attention to the disproportionate effect of exceptional powers on ethnic minorities, vulnerable groups, and religious minorities. The effects of counter-terrorism laws must also be calibrated in States where subjugated ethnic and religious groups are functionally a majority in a non-dominant position, whose lowered status is in part maintained by the use of exceptional powers. Entrenched counter-terrorism norms also often specifically affect women in gendered ways and human rights violations in permanent emergencies have both a gendered burden and a gendered hue. The Special Rapporteur strongly recommends a practice of national benchmarking, including the collection of independent and robust national data on the use of emergency powers and their specific effects on these groups.**

81. **International and regional mechanisms for the protection and oversight of human rights must revitalize their interest in contemporary emergency practice, more specifically the emergency effects of extensive counter-terrorism norms. States must be prodded and reminded to derogate and prompted — if they fail — to provide adequate information to enable assessment of whether emergences are justified and the measures taken are proportionate. It is vital to advance a culture of justification whereby officials have a duty to give reasons when they make important decisions affecting the rights of individuals.**

82. **Emergency powers that are created and perpetuated by counter-terrorism laws and practices should hasten their own demise by contributing to defeating the crisis that necessitates their enactment.**[59] **When States sustain de facto and permanent emergencies — including, in some cases, decades of unrelenting suspension of rights and freedoms — courts and oversight bodies should take a more sceptical view of the necessity and efficacy of State approaches and deference to the State should be limited. The longer the emergency, the higher the burden of justification for the State**

[58] See African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Libya*, application No. 002/2013, judgment of 3 June 2016.

[59] See Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing, 2018).

and the greater the emphasis should be on the costs of sustained rights limitations for individuals and groups.